

EXHIBIT D

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TENNESSEE
3 EASTERN DIVISION

4 UNITED STATES OF AMERICA .

5 VERSUS . NO. 1:04CR10097-001-T
6 DEMETRIUS "VAN" CROCKER . JACKSON, TENNESSEE
7 8:30 A.M.

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9
10 SENTENCING HEARING
11 NOVEMBER 28, 2006

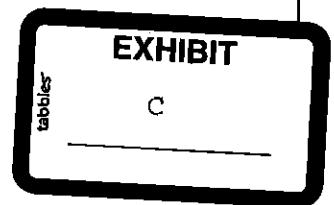
12 BEFORE THE HONORABLE JAMES D. TODD,
13 U. S. DISTRICT COURT JUDGE

14 APPEARANCES
15

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1 **THE COURT:** Mr. Godwin, let's talk a minute
2 about that double-counting argument by Mr. Alden.

3 2M6.1(a)(1) provides a base level of 42 if the
4 offense was committed with intent to injure the United
5 States.

6 Then guideline 3A1.4(a) says that if the
7 offense is a felony that involved or was intended to
8 promote a federal crime of terrorism, you increase by
9 twelve levels.

10 Mr. Alden points out that he thinks that's a
11 double-counting. How could you ever have a 2M6.1 offense
12 committed with intent to injure the United States that
13 would not also have a 3A1.4 twelve-level enhancement for a
14 crime intended to promote federal terrorism? I can't think
15 of one -- I can't think of a crime where if you had one,
16 you wouldn't have the other.

17 **MR. GODWIN:** I can, Your Honor, and my argument
18 would be, number one, if you had someone like the
19 Unabomber, who wasn't particularly political, he could have
20 sent -- well, I don't want to use somebody who's in -- But
21 you could have a person who would -- who could be targeting
22 a federal building but not be doing it to retaliate or
23 intimidate the government of the United States. In other
24 words, you could choose to blow up a -- I don't want to --
25 Because we're thinking of courthouses and things like that

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1 this level 20 applies.

2 And even if the court then determines that the
3 federal terrorism enhancement should apply, then we would
4 have a level 32, category VI, which is a completely
5 different thing than a level 42, category VI.

6 And so I think that we have to give meaning to
7 this. The disjunctive is pretty clear on it. And I think
8 that that's the basis of my response, Your Honor.

9 **THE COURT:** All right, gentlemen, the most
10 important substantive issue, as a threshold matter, is
11 whether 2M6.1(a)(1) applies or whether 2M6.1(a)(4) applies.
12 (a)(1) says the base offense level is 42 if the offense was
13 committed with intent to injure the United States. (a)(4)
14 says it's a base level 20 if the defendant is convicted
15 under the code section, the offense involved a threat to
16 use a nuclear weapon, nuclear material or a nuclear
17 byproduct material, a chemical weapon, a biological agent,
18 toxin, or delivery system, or a weapon of mass destruction
19 but did not involve any conduct evidencing an intent or an
20 ability to carry out the threat.

21 However, guideline 2M6.1 also applies to
22 attempts. So I guess we have to re-read section (a)(4) to
23 provide that it's a base level 20 if the defendant is
24 convicted under the section but did not -- but did not
25 attempt any conduct evidencing an intent or ability to

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1 carry out the threat.

2 It seems to me in this case the evidence is
3 clear that Mr. Crocker did have an intent. It's based upon
4 his specific statements about what he wanted to do with
5 this material. So he clearly had the intent.

6 Then I have to look at did he have the ability
7 to carry out the threat. And the answer is that he did
8 have some conduct which evidenced an ability to carry out
9 the threat. He attempted to get this sarin and actually
10 did get the C-4. So in dealing with an attempt, an effort
11 to acquire the materials, it seems to me -- or acquiring
12 the materials is an ability to carry out the threat. I
13 mean to take that explosive or that sarin and take it to
14 the nearest federal courthouse, which, coincidentally, is
15 this one, would not involve rocket science. It would be a
16 very easy matter to do.

17 So it's my judgment that there was conduct
18 which evidenced an intent and an ability to carry out the
19 threat in this case. So it's my judgment that 2M6.1(a)(1)
20 applies because this offense was committed with intent to
21 injure the United States. It, therefore, has a base level
22 of 42.

23 Turning now to the second objection, and that
24 is, does guideline 3A1.4 apply dealing with terrorism, Mr.
25 Alden takes the position that this twelve-level enhancement

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1 is, in effect, double-counting, and I agree. It seems to
2 me there may be some odd case where you could think of
3 where you could have a 2M6.1(a)(1) without 3A1.4, but it's
4 not this case. It seems to me in this case, this offense
5 was committed with intent to injure the United States.
6 It's a base level 42. It seems double-counting to then add
7 twelve more levels because this felony was intended to
8 promote a federal crime of terrorism.

9 And a federal crime of terrorism is described
10 in 18 U.S.C. 2332g, which I read earlier. But the federal
11 crime of terrorism means an offense that is calculated to
12 influence or affect the conduct of government by
13 intimidation or coercion or to retaliate against government
14 conduct. It seems to me that that is substantially what
15 2M6.1 is, an offense to injure the United States. So I
16 think it's a double-counting.

17 And, Mr. Alden, I'm going to sustain your
18 objection to the twelve-level enhancement.

19 So let's modify the presentence report and
20 change it from a level 54 to a level 42. And since there
21 are no adjustments, the adjusted base offense level comes
22 out at a 42 rather than a 54.

23 That has another effect, and that is it takes
24 away the automatic criminal history category of VI, and so
25 that puts Mr. Crocker back at a level 42 and a criminal

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1 history of I (one). The suggested sentencing range for 42
2 and a I (one) from the guidelines is 360 to life. So we
3 are dealing with a suggested guideline range now of 360 to
4 life rather than the restricted guideline range of life
5 itself. That may be a distinction without much of a
6 difference, but it is some difference.

7 Mr. Alden, if you want to make an argument now
8 about where the sentence should fall either within or
9 without the guideline range, I'll hear from you now.

10 **MR. ALDEN:** Thank you, Your Honor. Your Honor,
11 as the court knows, now that we've calculated the
12 guidelines, there was at least one Sixth Circuit case which
13 suggested that I had to yet again object to that, so I'll
14 just note my objection for the record.

15 **THE COURT:** Yes, sir.

16 **MR. ALDEN:** And we now have to turn to the
17 3553(a) factors. As Your Honor's aware, there are a number
18 of factors under 3553(a), and I'd like to just discuss a
19 few of those and how I believe they should influence the
20 court's sentence in this matter.

21 We've already been over the nature and
22 circumstances of the offense yet again today, Your Honor,
23 and it's clear that this is a very, very serious crime. No
24 one can make light of it. In fact, it's probably one of
25 the most serious crimes in the United States, especially in